IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 44 OF 1984

Keshav Mahadeo Purandare ... **Appellant (Heir of Original Defendant)**

Versus

(1) Sadashiv Kundalik Karhade
(2) Parvatibai Mahadeo Purandare
(3) Kamal Sitaram Joshi
(4) Prabhakar Mahadeo Purandare
since deceased by his heirs
and legal representatives;
(4a) Malati Prabhakar Purandare
since decased
(4e) Manisha Prabhakar Purandare
(5) Suman Madhukar Ambikar
(6) Malti Madhukar Agnihotri
(7) Vanita Vijay Rudrabhate
(8) Aparna Shriniwas Punde ... **Respondent**

(No.1 Original Plaintiff; Nos. 2 to 8 heirs of Original Defendant)

Ms. A.R.S. Baxi, Advocate for Appellant
Mr. Luckyraj Indorkar, i/b. M/s. Shaunak Satpute and Co. for Respondent No.1

CORAM : ***S.R.SATHE,J.***
DATED : ***17/08/2006***

ORAL JUDGEMENT :-

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1. Appellants, the legal heirs of original defendant have preferred this appeal against the judgement and order passed by the Extra Joint Judge, Pune in Civil Appeal No. 235 of 1981 whereby the order passed by Civil Judge, Junior Division, Saswad directing the defendant to deliver the possession of encroached portion i.e. 2 Ares and 10 Ares as shown in Exh-97 to Plaintiff was confirmed and the appeal was dismissed. For the sake of convenience hereafter parties shall be referred to as *'Plaintiff'* and *'Defendants'*.

2. The brief facts giving rise to this appeal are as under :-

The lands bearing Survey No.407/1 and 407/4 described in detail in para-1 of the plaint situated at Saswad, Taluka : Purandar were owned by Plaintiff. To the south of Plaintiff's property bearing Survey No. 407/1, there is land owned by defendant bearing Survey No.407/3. Similarly to the North of the Plaintiff's property bearing Survey No.407/4, there is property of the defendant bearing Survey No. 407/3. Some time in the year 1971-72, Plaintiff found that defendant had made an encroachment in Plaintiff's land and started

vahivat of the same. Plaintiff informed the defendant about the same and asked him to remove the encroachment. However, the original defendant did not give any heed to it. Plaintiff, therefore, made application for measurements of the suit land. Accordingly, the Cadestral Surveyor measured the suit land bearing Survey Nos. 407/1 and 407/4 as well as defendant's land in July-1974 in presence of Plaintiff and defendant. The Surveyor found that defendant had made an encroachment to the extent of 10 Ares in Survey No.407/1 and encroachment to the extent of 2 Ares in Plaintiff's land bearing Survey No. 407/4. The Plaintiff, therefore, filed Regular Civil Suit No. 61 of 1976 against the defendant for possession of the encroached land.

3. The defendant appeared and filed his Written Statement at Exh-14 and opposed the suit claimed. He contended that he has not made any encroachment and on the contrary, he is in vahivat of the land in question since last 90 years. He also contended that there is 'Bandh' between his land and defendant's land since long and he is having vahivat upto the said 'Bandh' and

there is no any change in the said 'Bandh'. He also contended that Plaintiff is having vahivat of the portion of the land as shown in Sale Deed, while defendant is also having vahivat as shown in his Sale Deed. The defendant further contended that in the Record of Rights, some access area was shown as Plaintiff's ownership through mistake and plaintiff took undue advantage of the same. The defendant alternatively contended that he is in possession of the alleged encroached portion since last 90-92 years continuously and thus, he has become the owner of the said portion by adverse possession. Hence on all these grounds, the defendant prayed for dismissal of the suit.

4. On these pleadings, the learned Trial Judge framed issues at Exh-15. In order to prove the suit claim, Plaintiff examined himself and Cadestral Surveyor Mr. Jagdale. As against this, on behalf of defendant, defendant No.1(f) Keshav Purandare was examined. The defendant also examined three other witnesses. Both the parties produced certain documents. After considering the entire evidence on record and mainly relying on the evidence of Cadestral Surveyor and the map drawn by him, the learned Trial Judge came

to the conclusion that Plaintiff has proved the encroachment as alleged. He, therefore, decreed the suit in Plaintiff's favour.

5. Being aggrieved by the said judgement and order, the defendant's heirs filed Civil Appeal No. 235/1981, however, the same was also dismissed. Hence, the heirs of original defendant have filed the present Second Appeal. While admitting the appeal, this Court (Coram : Jamdar, J.) passed the following order.

> *" Admitted on the point of law stated in para-(3) and (4) of the Appeal Memo." The said paras are as under :-*
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> ***(3)*** *It is submitted that whenever there is conflict between the area mentioned in the Sale-deed and the Record of Rights entries, the Sale-deed should prevail as it is a document of title.*
>
> ***(4)*** *The Court below has erred in relying upon the Record of Rights entries because no grievance was made by the Defendant in respect thereof. It is submitted that the Defendant could not make any grievance as he was not concerned with those entries so*

far as the same did not show any encroachment by the Defendant.

6. In this appeal before me, the learned advocate for the appellants/ heirs of original defendant has urged only two points. Firstly, it is submitted that learned Trial Judge has not considered the Sale-deed of the property in question and wrongly relied upon the evidence of the Cadestral Surveyor. Secondly, it was argued that the learned Trial Judge failed to consider the fact that since beginning, there was a 'Bandh' in between Plaintiff's land and defendant's land and the same is still in existence. Thus, according to the learned Advocate for the appellant/ defendant, the Plaintiffs are in fact in possession of the land. The area of which is more than the area shown in their Sale-deed. It was, therefore, submitted that the appeal be allowed and Plaintiff's suit be dismissed.

7. It is not in dispute that the lands bearing Survey Nos. 407/1 and 407/4 were initially owned by Plaintiff. It is also an admitted fact that to the South of Plaintiff's land bearing Survey No. 407/1, there is defendant's land bearing Survey No. 407/3.

Similarly, it is also admitted that to the North of Survey No. 407/4, there is defendant's land bearing Survey No. 407/3. In order to prove the alleged encroachment, the Plaintiff has mainly relied on the testimony of Cadestral Surveyor Mr. Jagdale and the map drawn by him. It is an admitted fact that at the time of measurments, both the parties were present and measurements was carried out as per the procedure. The defendants have not shown that Cadestral Surveyor did not follow proper procedure or that there was no base available to him for ascertaining the encroachment. Under such circumstances, due weightage shall have to be given to the measurements carried out by the Cadestral Surveyor Mr. Jagdale. From his evidence Exh-86 and the map drawn by him at Exh-97 it is crystal clear that the defendant has made an encroachment in Plaintiff's land as alleged and as shown in the map Exh-97.

8. Though, the learned Advocate for the appellants submitted that there is an error in mentioning the area of Plaintiff's land in Record of Rights, he could not convince the Court on the said point. In fact, the learned advocate was unable even to point out the exact

area owned by the plaintiff as per the Plaintiff's Sale-deed. Not only that but there is no convincing evidence on record to show that there is any such discrepancy in the area mentioned in the said Sale-deed and area mentioned in the Record of Rights. While considering this aspect, it must be noted that it is not the contention of the defendant that the boundaries of the suit land given by the Plaintiff in the plaint are incorrect or that the same do not tally with the boundaries of the land purchased by him under the Sale-deed. When such is the position, I am not inclined to accept the arguments advanced on behalf of the appellant that the Plaintiffs are in possession of access area than the area mentioned in their Sale-deed or in the Record of Rights. Incidently it must be mentioned that it is not even suggested to the Cadestral Surveyor that total land owned by Plaintiff is in fact less than the land shown in the Record of Rights.

9. It was argued on behalf of the appellant that admittedly there is a 'Bandh' in between the land of Plaintiff and defendant and the same is in existence. Even now the defendant's witnesses have stated that the

said 'Bandh' is in existence for last several years. However, the Courts below have discarded their evidence as not worthy of credence. On the contrary, we find that Plaintiff has stated that the 'Bandh' is created by the defendant after making an encroachment. Incidently, it must be noted that even according to the defendant, the height of the said 'Bandh' is about 2 ft. only merely because there are some trees on the said 'Bandh', one can not jump to the conclusion that Plaintiff was having his land only on the Northern Side of the said 'Bandh' or that he was having possession over the land only on the Northern Side of the said 'Bandh'. Thus, we find that there is in fact no substantial question of law involved in this matter. Both the Courts below have considered the entire evidence on record in its proper perspective and relying on the evidence of Cadestral Surveyor who is admittedly an independent witness held that the Plaintiff has proved the alleged encroachment.

10. In this view of the matter, there is no reason to interfere with the concurrent finding of fact recorded by the Courts below regarding the encroachment made by the defendant in Plaintiff's land. Hence appeal is dismissed with costs.

(S.R.SATHE,J)

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